

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

76-7167

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MILDRED POPKIN,

Plaintiff-Appellant,

-against-

NEW YORK STATE HEALTH AND MENTAL HYGIENE
FACILITIES IMPROVEMENT CORPORATION,

Defendant-Appellee.

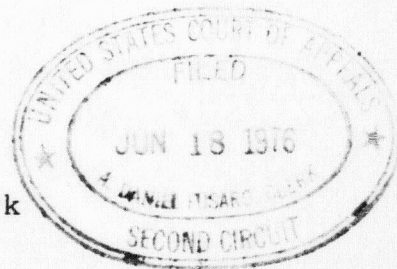
ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

MILTON KEAN
Attorney for Plaintiff-Appellant
60 East 42 Street
New York, N. Y. 10017

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendant-Appellee
Two World Trade Center
New York, N. Y. 10047

(5502A)



PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE MAC MAHON

Jury demand date:

D. C. Form No. 106 Rev.

75 CIV. 4698

TITLE OF CASE

208-1 75 4698 09 25 75 3 442 '1

ATTORNEYS

179. 6834 MAC MAHON J.

For plaintiff:

POPKIN, MILDRED

MILTON KEAN

Vs.

60 East 42nd Street

New York, N.Y. 10017

867-4616

NEW YORK STATE HEALTH AND MENTAL
HYGIENE FACILITIES IMPROVEMENT
CORPORATION

For defendant:

Louis J. Lefkowitz, Atty Gen. NYS
2 World Trade Center, NYC 10047
488-7402

11/76

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed x	Clerk	SEP 25 1975			
J.S. 6 mailed ✓	Marshal				
Basis of Action: discharged	Docket fee				
on grounds of sex.	Witness fees				
\$175 940.93 Civ. Rights					
Action arose at:	Depositions				

DOCKET ENTRIES

JUDGE MAC MAHON

85 CIV. 1

ATB

PROCEEDINGS

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5-25-75 Filed complt. and issued summons.
 5-3-75 Filed summons & Marshal's return. Served:
 NYS Mental & Hygiene Facilities By: Not served
 NYS Mental & Hygiene Fac. " "
 10-24-75 Filed Marshal's return. Served:
 NYS, Att'y Gen. By: M. Sattler 10-6-75
 NYS Health & Mental Hygiene Not served
 11-13-75 Filed Stip & Order extending to 11-10-75 for deft to move or
 answer the complt.....MAC MAHON, J AG
 11-28-75 Filed defts affdvt & notice of motion pursuant to Rule 12(b) that
 complt fails to state a claim upon which relief can be
 granted. Ret. 12-19-75
 11-28-75 Filed defts memo of law in support of motion to dismiss the complt.
 11-28-75 Filed summons & Marshal's return. Served:
 NYS Mental & Hygiene Fac. By: J. Sauervalo 11-11-75
 12-19-75 Motion adj. 1-16-76.
 2-23-75 Filed Stip & Order adjourning to 1-16-76 deft's motion to dismiss.
 Pltffs answering papers to be served by 1-9-76.....
 MAC MAHON, J
 1-12-76 Filed pltffs affdvt in opposition to motion to dismiss the complt.
 1-12-76 Filed pltffs memo of law in opposition to defts motion to dismiss
 - 1-15-76 Eld Reply Memorandum of NY State defts.-
 3-5-76 Filed Opinion & Order #44003. Def't moves, pursuant to Rule 12(b)
 (6)FRCP, for an order dismissing the complt for failure to
 state a claim for relief. For the reasons indicated, deft's
 motion is granted.....So Ordered, MAC MAHON, J m/n
 3-9-76 Filed Judgment & Order that deft New York State Health & Mental
 Hygiene Facilities Improvement Corp., have judgment against
 pltff Mildred Popkin, dismissing the complt, for failure to
 state a claim.Clerk m/n
 4-2-76 Filed Notice of Appeal to the USCA from the order dismissing the
 complt dtd 3-5-76, & the final Judgment thereon ent. on
 3-9-76. (Filed by pltff). Copy sent to Louis J. Lefkowitz,
 Att'y Gen. NYS, 2 World Trade Center, New York, N.Y. 10047.

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk

By

Deputy Clerk

Conformed
 per 4-30-76

SOUTHERN DISTRICT OF NEW YORK

SUMMONS

Defendant

You are hereby summoned and required to serve upon Milton Kean plaintiff's attorney, whose address is 60 East 42nd Street, New York, New York 10017 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ I. Wenhery
Deputy Clerk.

[Seal of Court]

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

MILDRED POPKIN

Plaintiff,

-against-

NEW YORK STATE HEALTH AND MENTAL
HYGIENE FACILITIES IMPROVEMENT
CORPORATION

Defendant.

----- x

COMPLAINT

Plaintiff, complaining of the defendant, by her attorney,
Milton Kean, alleges:

1. Plaintiff is a woman, a citizen of the United States
and a resident of the State of Louisiana, her post office address
at 4509 South Tonti Street, New Orleans, Louisiana.

2. Upon information and belief, defendant is a domestic
corporation incorporated and existing under the Laws of the State
of New York, with offices in the City and State of New York.

3. That at all times hereinafter alleged, defendant is
and was engaged in the business of, among other things, designing
and redesigning hospital and related facilities for the State of
New York.

4. At all times hereinafter alleged, plaintiff was and is
an architect licensed by the State of New York.

COMPLAINT

5. The jurisdiction of this Court is invoked under Title 42, United States Code, 2000e et seq.

6. That jurisdiction of this Court is further invoked in that the amount in controversy exceeds the amount of \$10,000, exclusive of interest and costs, and arises under the Constitution and Laws of the United States.

7. That jurisdiction of this Court is further invoked under Title 28, United States Code, 1332, in that there exists a diversity of citizenship of the parties hereto.

8. That during January of 1968, plaintiff was hired by the defendant as an architect with the title of Development Administrator.

9. That at all times hereinafter alleged, plaintiff performed her duties in a reasonable, proper and satisfactory manner.

10. That during November of 1970, plaintiff was advised by defendant that her employment would be discontinued no later than January 15, 1971.

11. That the act or acts of defendants in terminating the services of plaintiff was, or were, committed under color of there being a lack of work for plaintiff to perform.

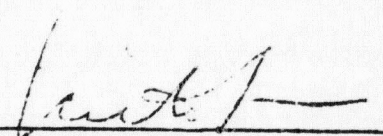
12. That defendant was without any justification or grounds in terminating the services of plaintiff and that her services were terminated for no other reason than plaintiff is a woman.

COMPLAINT

13. That the conduct of defendant in terminating the services of plaintiff, by reason of her sex, was in violation of the rights and immunities of this plaintiff, protected under Title 42, United States Code, 2000e et seq. which are incorporated herein by reference and made a part hereof.

14. That as a result of the conduct by defendant hereinabove alleged, plaintiff has been damaged in the sum of \$54,940.93 through December 31, 1974 representing the loss of wages, which damage continues to-date.

WHEREFORE plaintiff demands a judgment against defendant in favor of plaintiff awarding plaintiff the sum of \$54,940.93 plus loss of wages to the date of judgment herein, punitive damages in the sum of \$100,000, legal fees in the sum of \$25,000 and for such other and further relief as to this Court seems just and proper.


MILTON KEAN
Attorney for Plaintiff
Office & P.O. Address
60 East 42nd Street
New York, N. Y. 10017
(212) 867-4616

NOTICE OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MILDRED POPKIN :

Plaintiff, :

-against- :

NEW YORK STATE HEALTH AND MENTAL HYGIENE
FACILITIES IMPROVEMENT CORPORATION, :

Defendant. :

NOTICE OF MOTION

75 Civ. 4698
(L.F.M.)

-----X
S I R :

PLEASE TAKE NOTICE that upon the summons and complaint dated September 24, 1975, the affidavit of ROSALIND FINK, sworn to November 26, 1975 and all other proceedings heretofore had in this action, the undersigned will move this Court, in Room 1305 of the United States Courthouse, Foley Square, New York, New York, on the 19th day of December, 1975 at 2:15 P.M. or as soon thereafter as counsel can be heard for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the complaint fails to state a claim upon which relief can be granted, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
November 26, 1975.

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
Office & P.O. Address
2 World Trade Center
New York, New York 10047

TO: MILTON KEAN, ESQ.
Attorney for Plaintiff
60 East 42nd Street
New York, New York 10017

AFFIDAVIT OF ROSALIND FINK, ASSISTANT ATTORNEY
GENERAL, FOR DEFENDANT, IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

(SAME TITLE)

AFFIDAVIT
75 Civ. 4698

(L. F. M.)

-----x

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

ROSALIND FINK, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York and attorney for defendant, New York State Health and Mental Hygiene Facilities Improvement Corporation (hereinafter "NYSH&MHFIC").

I write this affidavit in support of defendant's motion to dismiss the complaint herein for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Fed. R. of Civ. Proc.

The NYSH&MHFIC was established pursuant to the Facilities Development Corporation Act, Laws of 1968, Chapter 359, McKinney's Unconsolidated Laws, Title 13-A, §§4401 et seq. It is a "corporate governmental agency constituting a public benefit corporation" (§4404) whose purposes include facilitation of timely provision, acquisition, construction, reconstruction, rehabilitation and improvement of State physical

AFFIDAVIT OF ROSALIND FINK, ASSISTANT ATTORNEY
GENERAL, FOR DEFENDANT, IN SUPPORT OF MOTION

and mental health facilities and community mental health and retardation facilities, assistance to the State departments of health and mental hygiene, and provision of facilities to the State office of drug abuse services and State department of correctional services. (§4406).

These functions would otherwise be performed by, inter alia, The State departments of law, health, mental hygiene and corrections, office of drug abuse services, narcotic addiction control commission, housing finance agency, medical care facilities finance agency, division of the budget, and office of general services, all of which are legislatively mandated to cooperate with and assist it. (§4414).

Its five directors are the commissioner of health, the commissioner of mental hygiene, and three persons appointed by the Governor with the advice and consent of the Senate, all five of whom are subject to removal by the Governor. (§4404)

Plaintiff has brought this action under the Equal Employment Opportunities Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§2000e et seq. Her complaint is based on alleged acts of discrimination taking place no later than January 15, 1971, the date that her employment was discontinued. (compl. para. 10).

Prior to amendment effective March 24, 1972, "political subdivisions" were exempted from coverage under Title VII. Defendant

AFFIDAVIT OF ROSALIND FINK, ASSISTANT ATTORNEY
GENERAL, FOR DEFENDANT, IN SUPPORT OF MOTION

NYSH&MHFIC believes that it is a "political subdivision" within the meaning of the Act, and further believes that the 1972 amendment eliminating the exemption for "political subdivisions" should have prospective application only.

THEREFORE, as plaintiff is complaining solely of allegedly discriminatory acts occurring prior to the effective date of the 1972 amendments to Title VII, defendant contends that plaintiff has failed to state a claim upon which relief may be granted against it.

/s/ Rosalind Fink

ROSALIND FINK

Verified November 26, 1975.

AFFIDAVIT OF PAUL H. KEAN, ESQ., FOR
PLAINTIFF, IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
MILDRED POPKIN :

Plaintiff, :

-against- :

NEW YORK STATE HEALTH AND MENTAL HYGIENE :
FACILITIES IMPROVEMENT CORPORATION :

75 Civ. 4698
(L.F.A.)

Defendant.
-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Paul H. Kean, being duly sworn, deposes and says:

1. I am associated with the attorney for the plaintiff in the above entitled action and make this affidavit in opposition to the instant motion to dismiss the complaint upon the ground that plaintiff has failed to state a claim upon which relief can be granted.

2. Defendant moves upon two grounds: (1) that defendant is a "political sub-division" and was thus not an employer subject to the sanctions of 42 U.S.C.A. §§2000e et seq. at the time the acts of discrimination took place and (2) that the above sections of the United States Code cannot be applied retroactively.

3. It is undisputed that the sanctions of the above referenced sections were in effect at the time of the acts of discrimination perpetrated by the defendant against the plaintiff

AFFIDAVIT OF PAUL H. KEAN, ESQ., FOR
PLAINTIFF, IN OPPOSITION TO MOTION

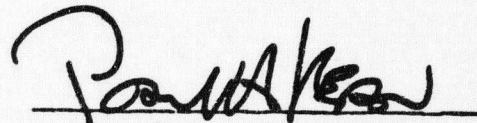
herein. Defendant alleges however that it was exempted from coverage thereunder until the statutes were amended effective March 24, 1972, to include "political sub-divisions".

4. It is respectfully submitted that the question of retroactivity is moot since defendant, by its own description 214 Unconsolidated Laws § 4 is not a "political sub-division". Nevertheless, it is respectfully contended that the provisions of 42 U.S.C.A. §§ 2000e et seq. are retroactive, and it would be inconsistent not to apply the statutes sued under herein retroactively.

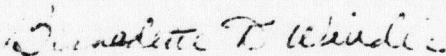
5. Defendant convincingly argues that the cases hold that it is a "political sub-division". In fact the cases merely set forth criteria to be used in determining the status of an entity when there is a question as to the status.

6. As will be clearly and indisputably shown in plaintiff's Memorandum of Law, defendant is not a "political sub-division" because it was not created as such. Thus defendant was not exempt from the provisions of 42 U.S.C.A. §§ 2000e et seq. even prior to the March 24, 1972 amendment thereof.

WHEREFORE plaintiff respectfully prays that this motion should be dismissed in its entirety.


Paul H. Kean

Sworn to before me this
9th day of January, 1976.

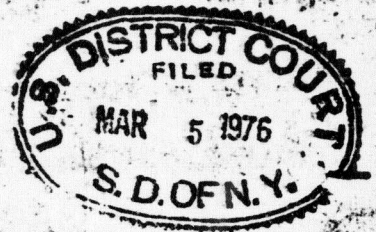


BERNADETTE D. WINDLE
Notary Public State of New York
No. 41 4609976 Queens County
Commission Expires March 30, 1977

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY



-----x
MILDRED POPKIN,

Plaintiff,

:
:
:
75 Civ. 4698-LFM

-against-

OPINION

NEW YORK STATE HEALTH AND
MENTAL HYGIENE FACILITIES
IMPROVEMENT CORPORATION,

Defendant.
-----x

44/003

APPEARANCES:

Louis J. Lefkowitz, Esq., Attorney
General of the State of New York,
for defendant; Rosalind S. Rink,
Esq., Assistant Attorney General,
of counsel.

Milton Kean, Esq., New York City,
for plaintiff; Paul H. Kean, Esq.,
of counsel.

MacMAHON, District Judge.

Defendant moves, pursuant to Rule 12(b)(6), Fed.
R.Civ.P., for an order dismissing the complaint for fail-
ure to state a claim for relief.

OPINION

The complaint alleges that plaintiff, a woman, was hired as an architect by defendant during January 1968 and that during November 1970 she was informed that her employment would be discontinued no later than January 15, 1971. Plaintiff contends that she was fired because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

Defendant asserts on this motion that it is a "political subdivision" of the State of New York and, as such, was specifically exempted from the operation of Title VII at the time the alleged discrimination occurred. Plaintiff, conceding that "political subdivisions" were exempt at that time, argues that defendant is not a "political subdivision," or, if it is, that the 1972 amendments to Title VII eliminating this exemption should be applied retroactively.

There is no precise formula which delineates exactly what makes a particular entity a "political subdivision." Nor does the mere characterization of an entity as a "political subdivision" make it one. Rather, the court must look into the functional relationship between the entity and the state in order to make this determination. See EEOC Decision No. 71-405, CCH Employment

OPINION

Practices 1973 ¶ 6182 (November 5, 1970); NLRB v. Natural Gas Utility District of Hawkins County, Tenn., 402 U.S. 600 (1971).

Defendant was created by Section 4404 of the Unconsolidated Laws of New York (McKinney Supp. 1975), after the legislature had made extensive findings, including:

"that the provision of new and improved state facilities relating to the care, maintenance and treatment of the mentally disabled must be accelerated if the state is to meet its responsibilities in the face of an increasing state population, a growing awareness that mental disability can be treated effectively, and new research advances in treatment methods. . . .

To assure that the required facilities are completed and ready for use as promptly as possible, the legislature hereby finds and declares that there should be created a corporate governmental agency . . . which could receive and administer monies for the construction and improvement of mental hygiene facilities and provide such facilities in accordance with the foreseeable needs for the care, maintenance and treatment of the mentally defective." (§ 4402)

OPINION

Another section of New York's Unconsolidated laws, Section 4406, states that the general purpose of the defendant corporation is to provide improved mental health facilities. Defendant is governed by a board of directors, comprised of the commissioners of health and mental hygiene, and three others who are appointed, and may be removed, by the governor (§ 4404). The directors must submit an annual report to the governor and to several state agencies and officials, detailing the corporation's yearly activities (§ 4415).

Defendant has been given broad powers, including the powers to sue and be sued, to acquire real and personal property, to make contracts, and "to do any and all things necessary or convenient to carry out its corporate purposes and exercise the powers given and granted it in this Act" (§ 4405). All money and property of the defendant is exempt from taxation (§ 4414), and all its financial matters are strictly prescribed by statute (§§ 4409, 4410).

We find from all of the foregoing that defendant is a "political subdivision" within the meaning of Title VII. We note in particular its direct creation by the state, its governmental function, and its

OPINION

accountability to the governor and other state officials.

Plaintiff's contention that the 1972 amendments to Title VII, eliminating the "political subdivision" exemption, should be applied retroactively is incorrect.

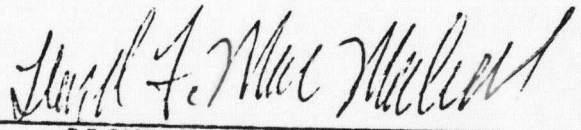
In Weise v. Syracuse University, 522 F.2d 397, 410-411 (2d Cir. 1975), it was held specifically that these amendments should not be given retroactive effect where the defendant had been absolutely exempt from coverage, as is the present case. The court emphasized that the retroactive application would result in manifest injustice because in this situation the amendments created new substantive rights.

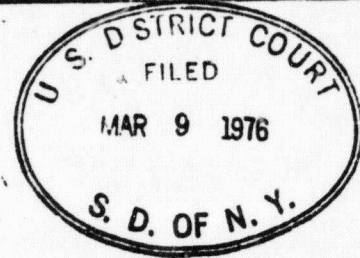
Accordingly, defendant's motion, pursuant to Rule 12(b)(6), Fed.R.Civ.P., for an order dismissing the complaint for failure to state a claim for relief is granted.

So ordered.

Dated: New York, N. Y.

March 4, 1976


LLOYD F. MacMAHON
United States District Judge

JUDGMENT APPEALED FROM*MacMahon J.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
MILDRED POPKIN

Plaintiff

: 75 Civil 4698 (LFM)

-against-

:

JUDGMENT

NEW YORK STATE HEALTH AND MENTAL
HYGIENE FACILITIES IMPROVEMENT
CORPORATION

:

:

Defendant

----- X

Defendant having moved the Court for an order dismissing the complaint, pursuant to Rule 12(b)(6), of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Lloyd F. MacMahon, United States District Judge, and the Court thereafter on March 5, 1976, having handed down its opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That defendant NEW YORK STATE HEALTH AND MENTAL HYGIENE FACILITIES IMPROVEMENT CORPORATION, have judgment against plaintiff MILDRED POPKIN, dismissing the complaint, for failure to state a claim.

Dated: New York, N.Y.
March 9, 1976

Raymond J. ...
Clerk

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
MILDRED POPKIN

Plaintiff,

-against-

75 Civil 4698 (LFM)

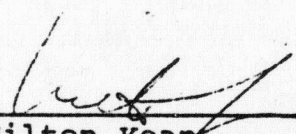
NEW YORK STATE HEALTH AND MENTAL HYGIENE
FACILITIES IMPROVEMENT CORPORATION

NOTICE OF APPEAL

Defendant. :
-----x

Notice is hereby given that Mildred Popkin, plaintiff
above named, hereby appeals to the United States Court of
Appeals for the Second Circuit from the Order dismissing the
complaint for failure to state a claim upon which relief can
be granted entered in this action on the 5th day of March,
1976 and the final Judgment thereon, entered in this action
on the 9th day of March, 1976.

Dated: March 31, 1976



Milton Kean
Attorney for Plaintiff
60 East 42 Street
New York, N.Y. 10017
(212) 867-4616

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THEODORE RICHMAN, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1361 E 88th
Brooklyn N.Y.

That on the 18 day of JUNE, 1976,
deponent personally served the within APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 1 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

HON. LOUIS J. LEFKOWITZ
ATTORNEY GENERAL - STATE OF NEW YORK
ATTORNEY FOR DEFENDANT-APPELLEE
2 WORLD TRADE CENTER
NEW YORK, N.Y. 10047

Sworn to before me this

18th day of June, 1976

Theodore Richman

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978